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AUTHORITIES CITED,

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

SAMUEL LEWIS, PETITIONER,
v.
G. OLIVER FRICK, UNITED STATES IMMIGRATION Inspector in Charge. } No. 208.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case is before this court upon a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit.

The petitioner, a native of Russia, came to the United States originally from Russia, embarking from London, England, on that journey, and arriving in New York City about September 20, 1904 (R., 5, 8). He lived in the vicinity of New York until March, 1910, when he went to Detroit, where he has since made his home. On November 17, 1910, he went from Detroit to Windsor, Canada,

remaining there not more than an hour or so, and brought back with him a woman, whom he claimed to be his wife. On February 14, 1911, he was ordered deported to Russia by the Secretary of Commerce and Labor for having brought this woman into the United States for an immoral purpose in violation of section 2 of the act of February 20, 1907, 34 Stat., 898 (R., 22).

The petitioner had been indicted in December, 1910, under section 3 of the act of 1907, as amended by the act of March 26, 1910 (36 Stat., 263), for the same act, and secured a stay of the execution of the warrant of deportation pending the trial. On March 23, 1911, he was acquitted of the criminal charge, which acquittal he submitted to the Secretary of Commerce and Labor, who, nevertheless, ordered the immediate execution of the warrant. Thereupon the petitioner sued out a writ of habeas corpus (R., 22–23).

The Circuit Court held that the petitioner was not an alien within the meaning of the immigration laws, and that if he was, he could not be deported for importing a woman into the United States for immoral purposes unless previously convicted of the offense, and ordered that he be discharged from custody, 189 Fed., 146 (R., 22–26). This decision was reversed by the Circuit Court of Appeals for the Sixth Circuit, 195 Fed., 693 (R. 33–40). The Supreme Court then granted a writ of certiorari, 225 U. S., 699.

STATUTE INVOLVED.

The following sections of the immigration act of February 20, 1907 (34 Stat., 898), as amended by the act of March 26, 1910 (36 Stat., 263), are involved:

SEC. 2. That the following classes of aliens shall be excluded from admission into the United States * * * persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose.

SEC. 3. That the importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden; and whoever shall, directly or indirectly, import or attempt to import, into the United States, any alien for the purpose of prostitution or for any other immoral purpose, * * * shall, in every such case, be deemed guilty of a felony, and on conviction thereof be imprisoned not more than ten years and pay a fine of not more than five thousand dollars. * * * Any alien who shall be convicted under any of the provisions of this section shall, at the expiration of his sentence, be taken into custody and returned to the country whence he came, or of which he is a subject or a citizen, in the manner provided in sections twenty and twenty-one of this act.

SEC. 20. That any alien who shall enter the United States in violation of law, * * * shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came

at any time within three years after the date of his entry into the United States.

SEC. 21. That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by section twenty of this act * * *.

SEC. 35. The deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or if such embarkation was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory.

BRIEF OF ARGUMENT.

To uphold the warrant of deportation the Government maintains the following five propositions:

I. The act of February 20, 1907 (34 Stat., 898), as amended by the act of March 26, 1910 (36 Stat., 263), applies to resident aliens like the petitioner.

II. The act of 1907 as amened by the act of 1910 does not make a conviction a condition precedent to the deportation of an alien who has imported a woman into the United States for immoral purposes.

III. The acquittal of the petitioner under the in-

dictment is not *res adjudicata* of the right to deport him.

IV. The criminal and deportation proceedings against the petitioner did not put him twice in jeopardy for the same offense.

V. The petitioner was properly ordered deported to Russia.

I.

The act of February 20, 1907 (34 Stat., 898), as amended by the act of March 26, 1910 (36 Stat., 263), applies to resident aliens like the petitioner.

This precise question has recently been determined in the Government's favor in the case of *Lapina* v. *Williams*, No.7, October term, 1913, decided January 5, 1914. It is true that in the *Lapina case* the petitioner was a prostitute without the shadow of a legal residence in the United States, while the petitioner in the present case apparently had such a residence (Tr., 9), but this difference of fact should not prevent the decision in the *Lapina case* from foreclosing the question involved here, there being no suggestion of any such distinction in the statute, nor in the opinion of the court, as appears from the following passage:

> Upon a review of the whole matter, we are satisfied that Congress, in the act of 1903, sufficiently expressed, and in the act of 1907 reiterated, the purpose of applying its prohibition against the admission of aliens, and its mandate for their deportation, to all aliens

> whose history, condition or characteristics brought them within the descriptive clauses, *irrespective of any qualification arising out of a previous residence or domicile in this country.*

The argument that the petitioner's return from Canada to this country was not an entry within the meaning of the act because it was merely the completion of what was intended to be a roundtrip *from* the United States *to* the United States is also disposed of by the *Lapina case*, since in that case there was a similar *animus revertandi*, the only distinction being in the length of the absence from the United States, which is of course immaterial. *U. S.* v. *Williams* (D. C. N. Y.), 187 Fed., 470.

II.

The act of 1907, as amended by the act of 1910, does not make a conviction a condition precedent to the deportation of an alien like the petitioner, who imported a woman into the United States for immoral purposes at the time of his own entry.

In *United States* v. *Wong You* (223 U. S., 67), it was held that where an alien is deportable under two separate statutes, both of which are in force, the Government may elect to proceed upon either statute. So if the method of deportation contained in sections 2, 20, and 21 of the act of 1907 is still applicable to the petitioner, in spite of the later amendment of section 3, the *Wong You case* is conclusive of the Government's right to use the method employed in the present case.

The petitioner is thus forced to the contention that the Government's right to deport him under the act of 1907 has been impliedly repealed by section 3, as amended by the act of 1910, with the result that he is not now subject to deportation, because he has not been convicted of a violation of the provisions of this section.

The combined effect of sections 2, 20, and 21 of the act of 1907 was that an *alien* procurer of alien prostitutes should be denied admission into the United States, or that if he succeeded in gaining admission by evading the immigration authorities he might still be deported to the country whence he came, if discovered within three years after his unlawful entry. These sections thus extended only to aliens whose entry into the United States was *unlawful*. For convenience such aliens will be referred to as class A.

Section 3 of the act of February 20, 1907, before being amended by the act of March 26, 1910, provided:

> SEC. 3. * * * whoever shall, directly or indirectly, import or attempt to import into the United States any alien or girl for the purpose of prostitution, or for any other immoral purpose * * *, shall, in every such case, be deemed guilty of a felony, and on conviction thereof shall be imprisoned. * * *

This section was directed against all persons. It was not limited to aliens, and reached and punished not only aliens of class A, whose deportation was provided for in sections 2, 20, and 21, but also aliens

who had lawfully entered the United States, and were not therefore deportable under the above sections. These aliens will be designated as class B.

It thus appears that under the act of 1907 aliens of class A might be deported to the country whence they came, as well as indicted, while those of class B might be indicted, *but not deported.*

The amendment of March 26, 1910, did not change section 2 of the former act in any particular material to this case, and left untouched sections 20 and 21. Section 3 was amended to read as follows (after providing that whoever imported an alien prostitute into the United States should be guilty of a felony in like manner with the act of 1907):

> *Any* alien who shall be convicted under any of the provisions of this section, shall, at the expiration of his sentence, be taken into custody and returned to the country whence he came, *or of which he is a subject or a citizen* in the manner provided in sections twenty and twenty-one of this act.

The effect of this provision upon aliens of the latter class was undoubtedly to give the Government the right to deport them, a right which it did not have under the act of 1907. The new right, however, was made available only after a conviction and the expiration of the sentence incurred thereby, since the aliens to whom it applied had lawfully entered the United States and in many cases might have established residences here. It is contended that conviction being thus made a condition precedent to

the right to deport aliens of class B, the same condition attaches to the right to deport those of class A, since both classes are within the express languge of the amendment.

But while the amendment does not in terms distinguish between the two classes, it does not follow that its operation upon them is the same. Whether this is so must of necessity depend upon their respective status before the amendment was passed. As to aliens of class B it created a new right of deportation, subject of course to the condition prescribed, but as to those of class A, whose deportation was provided for in the act of 1907, and had been so provided for in the act of 1903 (32 Stat., 1213), it had no such application. It can not be presumed that Congress intended to curtail or postpone the expeditious and long tried remedy established by these statutes by enacting the amendment of 1910, the avowed purpose of which was to shut down more tightly on all phases of so-called "white slavery." The construction contended for here gives full effect to this purpose, for it not only preserves all the Government's prior rights of deportation, but at the same time confers upon it the right to deport a class of aliens which it could not deport before.

But aside from being thus opposed to the legislative intent, the implication of a repeal is strongly negatived by the fact that the amendment upon which it is sought to be based is not to any of the sections which contain the old method of deportation, but to section 3, which authorized the criminal

punishment of alien procurers as distinguished from their deportation.

The construction urged by the Government is not open to the objection that it entirely excludes aliens of class A from the operation of the amendment. If such an alien is convicted of a violation of section 3, the amending clause takes hold of him and authorizes his deportation to either the country whence he came or *the country of which he is a subject or citizen*, the latter alternative not being possible under the act of 1907. The amendment is thus construed to have created new rights with respect to both classes of aliens, one authorizing the deportation of aliens of class B and the other enlarging the territory to which aliens of class A may be deported, a conviction under section 3, however, being a condition precedent to the exercise of both rights.

Under the existing law, therefore, the Government has two methods of dealing with an alien like the petitioner. It may deport him at once by virtue of sections 2, 20, and 21 of the act of 1907 to the country whence he came, or it may have him convicted of a violation of section 3, and, after his sentence has been served, deport him to either the country whence he came or the country of which he is a subject or citizen. It is free to elect either method (*U. S.* v. *Wong You*, *supra*.). Having elected the former method in the present case, the failure to convict the petitioner does not act as a bar to his deportation, as contended, but merely limits the place to which he may be deported to the country whence he came.

The holding of the Circuit Court below, which is the only authority to the contrary, was based upon the decision of the Circuit Court of Appeals for the Second Circuit in the *Wong You case* (181 Fed., 313), which was subsequently reversed by the Supreme Court (*U. S.* v. *Wong You, supra*).

The petitioner's contention was squarely repudiated in *Ex parte Pouliot* (D. C. Wash.; 196 Fed., 437), the only other case in point which has been found.

III.

The acquittal of the petitioner under the indictment is not res adjudicata of the right to deport him.

Under section 21 of the act of February 20, 1907 (34 Stat., 898, 905), the Secretary of Commerce and Labor has power to deport when he is "satisfied that an alien is unlawfully in the United States." A jury, on the other hand, can not convict unless satisfied of the defendant's guilt beyond a reasonable doubt. This difference in the degree of proof required to sustain a verdict for the Government in the two proceedings would, under the generally accepted rule, prevent the application of the doctrine of *res adjudicata* contended for by the petitioner.

Stone v. *U. S.*, 167 U. S., 178.

Micks v. *Mason*, 145 Mich., 212; 11 L. R. A. (N. S.), 653 and note.

State v. *Roach*, 83 Kans., 606; 31 L. R. A. (N. S.), 670 and note.

11 Columbia Law Review, 170.

To this general rule, however, an exception has been created by the decision in *Coffey* v. *U. S.* (116 U. S., 436, 443, 444). In that case it was held that a verdict of acquittal in a criminal proceeding for the violation of a statute was *res adjudicata* against the Government when it subsequently sought to enforce a forfeiture of the defendant's goods for the same offense. This rule was adopted in spite of the lesser degree of proof required to sustain a verdict for the plaintiff in the forfeiture proceeding (*Lilienthal's Tobacco* v. *U. S.*, 97 U. S., 237, 271), the court declaring "that the facts ascertained in a criminal case, as between the United States and the claimant, could not be again litigated between them as the basis of any statutory punishment denounced as a consequence of the existence of the acts."

The doctrine of the *Coffey case*, however, has been strictly limited to cases where the sovereign seeks to *punish* a defendant in another way for the same offense of which he has been acquitted. (*Chantangco* v. *Abaroa*, 218 U. S., 476.) It is inapplicable to civil actions to recover damages for the same act (*Stone* v. *U. S.*, 167 U. S., 178) and to proceedings in equity to abate a nuisance for which the defendant has been exonerated criminally (*U. S.* v. *Donaldson-Shultz Co.*, C. C. A., 4th C.; 148 Fed., 581), for the reason that the object and consequence of the second proceeding in these cases is not *punishment*.

Thus the precise question presented for decision is whether the deportation of an undesirable alien is a punishment within the meaning of the rule in the

Coffey case. This question has been answered in the affirmative by a district court (*Chin Kee* v. *U. S.*, 196 Fed., 74) and in the negative by the Circuit Court of Appeals for the Second Circuit (*Williams* v. *U. S.*, 186 Fed., 479).

There is an undoubted distinction between a judicial forfeiture of property such as was involved in the *Coffey case* and a deportation of an alien on the ground existing in the case at bar. A forfeiture seeks to take away property lawfully acquired by the claimant but used by him in a manner contrary to law and is essentially punitive. (*U. S.* v. *Reisinger*, 128 U. S., 398.) A deportation, however, is not directed against any property or privilege which has been lawfully acquired, but merely seeks to take away something to which the alien was never entitled—the right to enter and remain within the United States. For this reason it has been uniformly held that proceedings to deport are not criminal and that deportation itself is not a punishment.

> *Fong Yue Ting* v. *U. S.*, 149 U. S., 698, 730.
>
> *Wong Wing* v. *U. S.*, 163 U. S., 228, 237.
>
> *Zakonaite* v. *Wolf*, 226 U. S., 272.
>
> *Bugajewitz* v. *Adams*, 228 U. S., 585.
>
> Cf. *Johannessen* v. *U. S.*, 225 U. S., 227, 242.

In *Fong Yue Ting* v. *U. S.*, *supra*, Mr. Justice Gray said (p. 730):

> The proceeding before a United States judge, as provided for in section 6 of the act of 1892,

> is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the Government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.

And in *Bugajewitz* v. *Adams*, *supra*, Mr. Justice Holmes reaffirmed the doctrine in the following language (p. 591):

> The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want.

And in *Johannessen* v. *U. S.*, *supra*, Mr. Justice Pitney, in sustaining the validity of a statute providing for the annulment of fraudulently obtained certificates of citizenship, said (p. 242):

> The act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges.

The precise distinction contended for here was recognized by the Supreme Court in *Wong Wing* v. *U. S.*, *supra*, where it was held that although the deportation of aliens could be lawfully determined without a judicial trial, the *punishment* of aliens by imprisonment or *confiscation of property* could not be so determined.

The doctrine of the *Coffey case* is thus not controlling and there is no difficulty in holding that the acquittal of the criminal charge in the present case is not *res adjudicata* of the right to deport.

IV.

The criminal and deportation proceedings against the petitioner did not put him twice in jeopardy for the same offense.

If deportation is not a punishment, it follows that the guaranty against double jeopardy is inapplicable. It has been specifically held that an alien who faces deportation proceedings is not put in jeopardy.

> *Sire* v. *Berkshire* (D. C. Tex.), 185 Fed., 967.
> See *Pearson* v. *Williams*, 202 U. S., 281.

V.

The petitioner was properly ordered deported to Russia.

Preliminary questions arise as to the power of the court to consider the petitioner's contention on habeas corpus, and as to the nature of the relief which can be granted him, if it appears that his destination, as ordered, is illegal.

While this court has granted a writ of habeas corpus to a prisoner who is actually confined in a prison to which he could not legally be sentenced by the court which tried him (*In re Mills*, 135 U. S., 263; *In re Bonner*, 151 U. S., 242), it has always held that if a prisoner be legally detained and at a proper place at the time he petitions for the writ, his petition must fail notwithstanding the fact that his detention *will* become illegal in the future. The petition is premature *until* the *detention* becomes *in some respect unlawful*.

Ex parte Lange, 18 Wall., 163.
In re Swan, 150 U. S., 637, 652.
U. S. v. *Pridgeon*, 153 U. S., 48.
De Bara v. *U. S.* (C. C. A. 6th C., Taft, Lurton, and Day), 99 Fed., 942.

Upon similar reasoning it has been held that an alien who has been ordered deported can not challenge the legality of his destination on habeas corpus, if it appears that he is one of an excluded class and is thus properly in custody. (*U. S.* v. *Williams*, D. C.

N. Y.; 187 Fed., 470.) In that case the proposition was thus stated by Judge Hand:

> Two questions therefore arise: First, whether Austria is the country whence he came; and, second, whether, if this be not so, a writ of habeas corpus can inquire into his proposed destination. I do not think that it is necessary to determine the first question, for I do not see how a writ of habeas corpus can review such a mistake, if it be a mistake, on the part of the authorities. That writ inquires simply into the validity of the relator's detention, and concededly his detention is legal. Even if it be true that the Secretary of Commerce and Labor intends to deal illegally with him, and even when that intention appears from the very warrant under which he is detained, the writ on that account could not release him from custody, unless he has the right to remain in the country, which he has not.
>
> It is suggested that he might be released upon the theory that his detention would become illegal as soon as they did with him what the law does not permit. The difficulty with this argument, however, is that he would none the less be properly in custody and subject to deportation, because they were violating the law in sending him to the wrong place. The detention being legal, at most a court could direct the Secretary of Commerce and Labor to send him to Canada, and not to Austria; but that, of course, no court has jurisdiction to do. It is only after the court has adjudged that the alien has a right under the statute to

remain in the country that a writ of habeas corpus can release him (*Chin Yow* v. *U. S.*, 208 U. S., 8.).

It is true, however, that a majority of the courts which have passed on the question have not hesitated to inquire into the legality of the place of intended deportation on habeas corpus proceedings.

Lavin v. *Le Fevre* (C. C. A., 9th C.), 125 Fed., 693.

Lui Lum v. *U. S.* (C. C. A., 3d C.), 166 Fed., 106.

Ex parte Yabucanin (D. C., Mont.), 199 Fed., 365.

U. S. v. *Ruiz* (C. C. A., 5th C.), 203 Fed., 441.

U. S. v. *Sisson* (C. C. A., 2d C.), 206 Fed., 450.

But conceding that the legality of the petitioner's destination may be questioned on habeas corpus, and that the destination directed in this warrant is illegal, still the petitioner is not entitled to be discharged, but only to have the warrant amended so as to conform with the requirements of the law.

In re Bonner, supra.

Wong Wing v. *U. S., supra.*

Ex parte Yabucanin, supra.

U. S. v. *Ruiz, supra.*

U. S. v. *Sisson, supra.*

In re Tani, 29 Nev., 385; 13 L. R. A. (N. S.), 518 and note.

THE MAIN QUESTION.

Passing to the merits of the petitioner's contention, the question presented is whether "the country whence he came" means, under the facts existing when this deportation order was made, (1) the country from which the petitioner originally came to the United States (Russia); or (2) the country of the trans-Atlantic port at which on that journey he embarked for the United States (England); or (3) the country from which he last came back into the United States (Canada).

The question was not, and could not have been involved in the *Lapina case*, since in that case both entries were from the *same* foreign country. Nor has any case been found in which the statute has been construed as to two entries, from different countries, the first lawful and the second unlawful, as here.

In support of the contention that his deportation must be to Russia, by way of London, or to London, it is submitted:

(1) The words "country whence he came" represent the country *from which he started* on a journey, the final destination of which he had then determined should be some point within the United States. Thus tested, Canada as a point of deportation, becomes impossible; because the journey (on which, after an hour's presence in Canada, he returned to the United States) had its *origin* in the United States, *for when he started from Detroit* to go to Windsor, he then had a fixed purpose to return into the United States the same day. This view is not at all incon-

sistent with the idea that having left the United States and returned again within its borders on the same single journey, he made in fact, a new entry into the United States *in the course of that journey*, which entry was unlawful because of the circumstances under which it was made.

(2) That the country whence he came is the country in which the journey started is borne out by the fact that the act elsewhere refers (sec. 12) to the "*final destination*" beyond the port of entry in the United States, and also (sec. 21) to the "*final destination*" of the alien in deportation, thus covering both *termini* of the journey. Also by the fact that the act repeatedly uses the words "entry," "enter," "entering," "entered," "port of arrival," "seeking admission from *contiguous foreign* territory" (sec. 1), "embarkation *for foreign contiguous territory*" (sec. 35). This forces the conclusion that the words "country whence he came" can not be limited in every case to the country from which he immediately *entered* and that the different language was advisedly used to convey a broader meaning.

The framers of the act were keenly alert to the difference between the country in which was the port of embarkation, the country from which the alien may have immediately entered the United States, the country in which the journey began which resulted in the entry into the United States, and the country which was the country of citizenship or nativity of the alien. We have prepared and attach hereto as an appendix references to lan-

guage in the various sections of the act showing how these several points were distinguished and in terms referred to in the framing of the act. This summary makes clear that the words "country whence he came" were advisedly and carefully used. We insist that the true meaning of this language and the intent of the framers of the law in using this language was, that when deported the alien should be sent, if unconvicted of crime here, to that country in which he was when he started upon the journey the *final destination* of which he then meant to be and afterwards accomplished to some point within the United States. In referring to Canada and Mexico, all through the act they are either referred to in specific terms as the "Dominion of Canada," and the "Republic of Mexico," or as "foreign contiguous territory." Of course, the language "to the country whence he came" must be given a meaning broad enough to include Canada if it be the country of which the alien to be deported was either a subject or citizen or in which he was staying when he conceived the purpose of entering the United States. But this result would ensue under the interpretation which we urge for this language.

Were the words held synonymous in all cases with the *country from which he immediately entered*, then in the case of an alien embarking from a trans-Atlantic port through Canada, the provision of section 35 would be rendered nugatory; as would also the provision "*or* of which *he is* a subject or

citizen" (amendment of 1910 to sec. 3), in the case of a *convicted* alien, who is a subject or citizen of a European country. All these sections negative the inference that "the country whence he came" must necessarily be the country of *immediate entry*, and it was so held in *Lavin* v. *Le Fevre* (C. C. A., 9th C.; 125 Fed., 693). There the petitioner unlawfully entered the United States from France, subsequently went to Canada, and upon her reentry here was ordered deported to France, although Canada was the country of immediate entry. The court held the warrant of deportation valid under the immigration act of 1891, which provided that aliens who unlawfully entered the United States should be immediately sent back to the country whence they came on the vessels bringing them. This provision appears in section 19 of the present act.

The Circuit Court of Appeals for the Second Circuit, about the middle of this month, decided in the case of *United States ex rel. Hans Bauder* v. *Uhl, Commissioner*, that having been excluded at the time of his first attempted entry into the United States because he then had with him a woman whom he was importing for immoral purposes, the petitioner thereby became forever disqualified from entry. And though he had several times thereafter, and from different countries, entered in an unobjectionable manner, having been seized under one of the later entries, he was rightfully deported, and to Switzerland, the country from which he first attempted entry into the United States. Of course, in that case the original attempted entry was

unlawful, but the first and every subsequent entry, considered individually, was free from objection, save as affected by the initial attempt. The case is at least authority to the effect that in the selection of the place to which the alien shall be deported the officers are not limited to some point in connection with the journey of last entry upon which the alien was apprehended.

(3) The argument will undoubtedly be made that because the deportation was based on the last and unlawful entry *from* Canada that therefore the deportation can only be *to* Canada. We concede that the *right* to deport was based on the unlawful entry or return from Canada. But we insist that the conclusion as above is wholly unsound. Whether an alien is in the United States in violation of the law is one question. What is "the country whence he came" is another question. And each may be decided without *reference to the other*. That Lewis was unlawfully in the United States must have been decided before the question of the place to which he should be deported could be reached for consideration. The latter question is not necessarily determined by any particular entry but by the reference to the substantial facts in the case. Especially is there no necessary limitation to the particular incoming or return that forms the basis of the previous adjudication of unlawful entry. Other and larger considerations enter into this second question.

The act was framed with a sense of the obligations owing by this Government to other nations under principles of international law in connection with

the disposition of immigrants who might be under our policies objectionable. Section 39 of the act empowers the President to call "an international conference * * * or send special commissioners to any foreign country for the purpose of regulating by international agreement * * * the immigration of aliens to the United States; of providing certain * * * examination of such aliens * * * at the ports of embarkation or elsewhere," etc. There is present in the act, we insist, recognition throughout that the return of objectionable or criminal aliens should be to that country which in good conscience should bear the burden of responsibility. This country is either the country of which the deported alien is a citizen or the country in which he was when he started on the journey with a then purposed point of final destination in the United States. We think that the amendment to section 3 in the act of March 3, 1910, recognizes a distinction in this respect between aliens convicted under the act (i. e., criminals) and aliens not convicted. As to the former (criminals), they are deportable either to the country wherein their journey to the United States had its origin or to the country of citizenship, whichever might seem morally more responsible for them. And this larger discrimination in deportation was lodged, because in this case convicted criminals, as distinguished from persons merely objectionable under the policy of our laws, were being dealt with.

As supporting the idea that, in the exercise of the power to deport, there is no restriction to the last incoming or return, or to a journey resulting in an *unlawful* entry as distinguished from one resulting in a *lawful* entry, we suggest that a mere privilege, and not a right, is bestowed upon the alien under the act; that so long as he remains an alien, he is here by favor and not of right; that when he enters (lawfully, if you please) he does it with the implied condition that during the period of his stay as an alien in this country he will so comport himself as not to ate the provisions of the act, and so be entitled to remain; and that upon breach by him of this obligation the privilege originally granted him stands forfeited, and he may be deported therefore, to the country from which he originally came as an alien to this country.

(4) Moreover, the act itself does not require that the journey to be considered in determining the "country whence he came" should be a journey in the course of which an *unlawful* entry was made into the United States. This is made manifest by the provisions of section 3 declaring in substance that an alien woman or girl who might be found practicing prostitution within three years after entering the United States "shall be deemed to be unlawfully *within* the United States, and shall be deported as provided in sections 20 and 21 of this act." If the practice of prostitution began, as it might, after entering into the United States, her entry would have been perfectly lawful, but by reason of the after

practice she would have become unlawfully within the country; and though her original entry was lawful, yet that entry and the journey which produced it would necessarily be considered in determining the country whence she came and the place to which she should be deported.

We may add the case of an alien who himself lawfully entered the United States, but afterwards received, held, and controlled women within the United States for immoral purposes. Such an alien, if *convicted*, though guilty of no unlawful entry whatever, would be subject to deportation under the act, and in determining the place to which he should be deported, the consideration of locality could not be limited to an unlawful entry—for there was none. It would necessarily be predicated upon the termini of the journey which represented his first or some later entry into the United States—it or all of them being lawful.

This is also true of those who, within the period fixed by the law after lawful entry, become public charges, and therefore subject to deportation. Other examples might be discovered under the provisions of the act.

(5) Limiting the deportation of an alien either to the country from which he last immediately entered or returned, or to the country from which he illegally entered, would in many cases lead to anomalous results not only from the standpoint of this country but from that of the foreign country as well. This is well illustrated by the case at bar. Here is a Russian

alien who came from Russia to the United States. To order him deported to Canada would thrust him upon a neighbor country, even less responsible for him than we are; for we voluntarily admitted him within our boundaries. He never was a citizen or subject of Canada; never owed it any allegiance; never was even a part of its population; and never resided or was domiciled there. The policy of attempting to return to an innocent and totally unrelated country, derelict and undesirable aliens merely because they effect an illegal entry or return from its territory, can hardly be justified under any theory of international comity. And it can not lightly be presumed that Congress intended such a result. Indeed, it appears from the following language in the Senate report on the act of 1903, that the purpose was just the opposite:

> Section 36 (now section 35 of the act of 1907) provides that the deportation of aliens found unlawfully in the United States shall be to the *transoceanic* countries from which they came, *thereby avoiding the ineffective transfer of such persons, in case of their having obtained access to this country from foreign contiguous territory, to points whence they can readily return* (S. Rept. 2119, p. vii, 57th Cong., 1st sess.).

Moreover, Canada has properly protected itself against such an affliction; and would absolutely refuse to receive this alien from the United States unless a $500 head tax were paid for him. This payment

can not be made under existing conditions. And we would therefore be confronted with the case of an alien within our borders subject to deportation, but no place on earth to which he could be deported.

From the standpoint of the petitioner, too, deportation to Canada is entirely incongruous, since (for aught that appears in the record) he has never visited that country but once in his life, and then only for a few hours. His domicile and his affiliations are wholly Russian.

The country whence an alien came is thus more properly to be construed as being the country of his *original* rather than his *illegal* or *last* entry, for the simple and cogent reason that in nine cases out of ten the former will be a country where he belongs, while the latter will not.

It may be noted in this connection that section 12 of the act, which enumerates what shall be contained in the lists to be furnished at the port of arrival concerning incoming aliens, requires "the nationality, the race, the *last residence*, and *name and address* of the *nearest relative in the country from which the alien came*." This clearly carries the suggestion that by "the country whence he came" is meant some country in which he might be likely to have relatives, i. e., where he might be said to belong when he started for the United States.

(6) The following illustration explains the theory of the Government as to the application and meaning of the language to be construed as applied t a case in which there is more than a single entry:

The parents of a child born in Russia migrate when he is 5 years of age to Austria, taking him with them. He there grows to manhood; determines at 21 years of age to come to the United States, embarking at Cherbourg, France, for Montreal, with ultimate destination New York City. After lawfully entering the United States he goes across to Canada—purposing, when leaving the United States, to immediately return; and does so. This, his second entry, is unlawful. In this case the alien, because his original entry was lawful, must be convicted of a violation of section 3 before he can be deported to Russia, the country of which he is a citizen. If *not convicted*, he is nevertheless subject to deportation. And, having embarked from a trans-Atlantic port, section 35 requires that he be returned to Austria through the port of Cherbourg, unless section 35 limits the final destination point in deportation. In any event the "country whence he came" in the supposed case would always be either Austria, or France; and in the case at bar either Russia or England.

The difficulties attending the question arise largely from the fact that the framers of the act did not provide specifically for the case of successive entries. If, however, they had entertained the broad view of the meaning of the words "country whence he came" that we are contending for, of course no selection as between successive journeys of entry would have been necessary in drafting the act.

We are advised that the practice of the Department of Labor under the act has conformed to the view we are here contending for.

CONCLUSION.

We therefore conclude:

That when he returned from Canada, the petitioner unlawfully reentered the United States and became subject to deportation despite his acquittal of the criminal charge; that the order deporting him to Russia will return him to the "country whence he came" within the meaning of the act; and that the decision of the Circuit Court of Appeals should be affirmed.

WILLIAM WALLACE, JR.,
Assistant Attorney General.

JANUARY, 1914.

APPENDIX.

34 Stat., 898.

Section 1. The tax of $4 "for every alien *entering* the United States" is payable to the collector nearest the port or district *to* "*which* such alien *shall come*."

Aliens who have had "an *uninterrupted* residence of at least one year *immediately* preceding *such entrance* (in the Dominion of Canada, Newfoundland, Republic of Cuba, or Republic of Mexico)" are excepted.

Secretary may arrange with transportation lines for payment of tax so imposed "upon any or all aliens *seeking admission* from *foreign contiguous territory*."

President may refuse to let passport-holding aliens "*enter* the continental territory of the United States *from such* other country," etc.

Section 2. Act does not apply to aliens "in immediate and continuous transit through the United States to *foreign contiguous territory*."

Section 3. "Within three years after she shall have *entered* the United States."

Section 8. "Any alien * * * not lawfully entitled to *enter*."

Section 9. "In which the *port* of *arrival* is *located*."

Section 12. "To deliver to the immigration officer at the *port of arrival* lists * * * made at the time and *place* of *embarkation*," stating "the *nationality*, the race, the last *residence*, the name and address of the *nearest relative* in the *country from which the alien came*." * * * "The *final destination*, if any, *beyond* the port of landing." "Whether ever before in the United States, and if so, when and where."

Section 19. All aliens brought unlawfully shall be "sent back to the *country whence they* respectively *came* on the *vessels bringing* them."

'Or fail to *return them* to the *foreign port from which they came.*"

Section 20. "Any alien who shall *enter* the United States in violation of law" shall be deported "*to the country whence he came,*" "by whom the alien was unlawfully induced to *enter.*"

Section 21. "And *returned to the country whence he came.*" "Who shall accompany such alien to his or her *final destination.*"

Section 24. "Touching the right of any alien to *enter* the United States."

Section 25. "The various *ports of arrival.*"

Section 32. "Rules for the entry and inspection of aliens along the borders of Mexico and Canada."

Section 35. "Aliens arrested within the United States after *entry* and found to be illegally therein," shall be deported "to the *trans-Atlantic* or *trans-Pacific ports from which the alien embarked* for the United States." "Or if such embarkation was *for foreign contiguous territory* to the foreign port at which said alien embarked *for such territory.*"

Section 36. "All aliens who shall *enter* the United States, except * * * shall be adjudged to have *entered* the country unlawfully and shall be deported as provided for in sections 20 and 21 of the act."

Section 42. "Passengers who have been taken at any port or place in a foreign country or dominion (ports and places in *foreign territory contiguous to the United States* excepted)."

O

No. ~~1010~~ ? ~~574~~ 208

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1911

SAMUEL LEWIS,

Petitioner.

vs.

U. OLIVER FRICK, United States Immigration Inspector, In Charge,

Respondent.

BRIEF OF PETITIONER

Philip T. Van Zile
Counsel.

Frederic S. Florian,
Guy W. Moore
H. P. Wilson,

Attorneys and of Counsel
for Petitioner.

Dated, Detroit, Michigan, March 11, 1912.

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BRIEF OF PETITIONER

STATEMENT.

The printed record filed in this court by appellant embodies the petition of Samuel Lewis, appellee in this case for writ of habeas corpus, in which is included as Exhibit A, the hearing in the matter of his examination before the Immigration Inspector on which is based the warrant ordering his deportation.

On page 8 of the record, is found *appellee's* testimony to the effect that he entered the United States at New York City, September 20, 1904, and that he was then examined and regularly admited into the country by the Immigration

Authorities. The record discloses also that appellee is a native of Russia and that prior to his coming to this country from Russia (R., 6) he was married by a Rabbi of the Jewish faith to Leah, a daughter of Isaac, with whom he lived 5 or 6 months when he left her and came to the United States, landing in New York about September 20th, 1904. He resided in New York until March 10, 1910, when he came to Detroit (R., 9). Since coming to Detroit he has lived at number 153 Napoleon Street, which is at the present time his home and which was his home continuously from that time until he was indicted by the Federal Grand Jury.

Lewis also testified (R., 10) that during the time he lived in New York City he was arrested once; that he did not know what charge was made against him, but that he was fined ten dollars ($10.00), which he paid. It does not appear that the guilt of any charge was proven or that at any time did Lewis admit the guilt of any offense. Lewis also stated that he did not see his wife Leah after coming to America until he met her at Windsor (R., 11) on November 17, 1910; that on that day he went to work in the morning and at dinner time when he returned home Mr. Berman was waiting for him and Berman told him that he had received a telegram that his wife and Lewis' wife were coming here and that he wanted Lewis to go over to Windsor with him to meet them; that he went over to Windsor and "stood there about 15 or 20 minutes and got on a train to the station at Windsor and met her there," and that they came over to the Immigration Office; that at the Immigration Office (R., 12) he took an oath that she was his wife and they then went to his home at number 153 Napoleon Street, but she refused to stay there because she said "The house isn't clean and somethings." She did not stay with him and he heard Sunday morning that she had been arrested.

Lewis stated further (R., 13) that he had never been divorced and that neither Leah Lewis nor Berman told him that she (Leah) had left a man by the name of Hochberg in London; that at Leah's request, he (Lewis) stated at the Immigration Office that she had been living in Detroit and had simply gone across that day to Canada; that he then stated that she had come from Canada and they made him pay four dollars ($4.00) head tax for her; that he had never been arrested in Detroit except this time and that he never knew that Leah was a shoplifter and when he brought her here he did not want her to do any wrong (R., 16). On May 16, 1906, Lewis declared his intention of becoming a citizen of the United States. (R., 17, Exhibit F.)

On December 9th, 1910, Lewis was indicted by the Grand Jury on the charge that on the 17th day of November, 1910, he imported and brought to the country an alien woman for an immoral purpose in violation of Section 3 of the Immigration Law as amended March 26, 1910. On March 23, 1911, the indictment came on to be tried in the District Court for the Eastern District of Michigan, Southern Division. The trial jury rendering a verdict of not guilty.

The warrant directing the deportation of Lewis to Russia contained the following formal allegations which are the same as are incorporated in the findings of the Secretary of Commerce and Labor, to-wit:

> "That the said alien was a member of the excluded classes in that he has been convicted of and admitted having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States; that he procured, imported and brought into the United States a woman for an immoral purpose; that at the time of his entry into the United States he was a person likely to become a public charge; and that he is unlawfully within the United States, in that he secured admis-

sion by false and misleading statements, thereby entering without the inspection contemplated by law."

On April 13, 1911, a writ of habeas corpus was allowed from the District Court, the hearing thereon being had the following day. In answer to the petition for the writ of habeas corpus the Immigration Inspector, as respondent, recited (R., 21) that petitioner was on the 24th day of November, A. D. 1910, placed under arrest by virtue of a warrant from the Department of Commerce and Labor * * *. That the Secretary of Commerce and Labor had adjudged that said alien was a member of the excluded classes. On April 21 (R., 31) an order was entered discharging petitioner, but granting a stay of the discharge to enable the District Attorney to perfect an appeal if desired.

INTRODUCTION.

The importance of this case will at once appear. It involves much more than the liberty of an individual and the rights of an alien resident to freedom of movement and protection of person and property. The decisions on the questions here involved, determine in a measure the status of every resident of the country and of every person sojourning here whether citizen or alien.

Aliens have always been allowed to reside in the United States, acquire property here and enjoy the rights and privileges of citizenship to this extent at least, that their right to leave the country temporarily and to return after a sojourn abroad either to the land of their nativity or other foreign country has never been questioned and this right has been recognized though such aliens may have elected to maintain their citizenship in the country from which they originally came.

The unbroken current of authority since the earliest reported cases, is that an alien not a member of any of the inhibited classes who has without any fraud, deception or artifice gained admission to the country regularly and lawfully and has acquired a domicile here is not subsequently subject to inspection and exclusion under the Immigration Laws upon returning to the country after a temporary absence. It was so held in the case in Re Maiola, reported in the 67th Federal, 114. This case, however, differentiates between an immigrant and an alien and designates the party as an immigrant when coming to this country in 1892, at which time he was regularly admitted, but not as an immigrant when returning to the country in 1895 after a temporary absence.

Other cases covering the general proposition and applicable under the statute as now existing are numerous and will be cited in the body of the brief. It is equally well settled that errors of law by any executive department may be reviewed by the courts and that the Department of Commerce and Labor has no authority to deport an alien except such authority is given it by law.

BRIEF OF THE ARGUMENT.

I.

The authority of the courts to review the decisions of the Secretary of the Department of Commerce and Labor on Habeas Corpus, is well established by the numerous reported cases; this authority is unquestioned having been exercised by the judiciary and recognized by the department since its earliest existence.

II.

Appellee, Samuel Lewis, is not an alien, amenable to the immigration laws, and is not subject to inspection and deportation while residing lawfully and peaceably in the United States for the reason that he was admitted into the country lawfully and regularly in 1904. It is not claimed that he was guilty of any fraud, misrepresentation or deception and manifestly, he does not stand in the class of those aliens who have entered the country, fraudulently in the first instance, and who therefore, can acquire no rights which the government must recognize. Neither is he within that class of aliens, excludable under our laws who are "detained" or "duly held" at our borders.

III.

In the judiciary is vested the inherent and constitutional right to review errors of law by executive departments or any of the branches thereof, and no legislation has thus far attempted to deprive the courts of jurisdiction in cases wherein are involved erroneous conclusions of law. This applies with equal force to the Department of Commerce and Labor and other departments.

IV.

Whether the decisions of the Secretary of the Department of Commerce and Labor are final and conclusive on all questions involving immigration, or the rights of aliens in this country, include, necessarily, in its consideration, the question of the jurisdiction of the courts on habeas corpus and their right to review errors of law.

That the department's decisions, on all questions, are not final, appears to have been authoritatively settled.

V.

The rule that ~~where~~ cases brought within a particular enactment, are excluded from the general statute, relating thereto, is applicable in this case. Section 2 of the Immigration Act describes the classes of aliens who shall be excluded from admission into the United States, and Section 3 has taken from this general class a particular class, providing for deportation in case of conviction.

VI.

The rule, that where a warrant is not specific, or where sentence is illegal, the prisoner is entitled to his liberty, is also applicable in this case. Lewis was not sufficiently apprised in the warrant of what he was expected to meet and as the whole proceedings were based on the occurrences of November 17, 1910, the department in event of his conviction, had no authority under the law to order his deportation to any country other than Canada.

ARGUMENT.

The government of the United States is founded on the principles of "Justice, Freedom and Equality" as is outlined in the Constitution and propounded in the Declaration on which our independence is based. To ultimately realize these ideals, or as a means for the nearest approach thereto, the founders of the nation wisely provided that there should be three separate and distinct departments of government, namely, the Legislative, the Executive and the Judicial, the first or legislative department having power to ordain or prescribe the laws and to change, amend or repeal existing laws, the second or executive, having power to administer and enforce the laws and carry them into practical

operation and in the third or judicial, there is the power to apply the laws to contests or disputes between the state and private persons, or between individual litigants, and this power of necessity must include the power to review, interpret and construe the laws and render authoritative and final judgments thereon.

The principle of the separation of these three departments imposes upon each the limitation that it must not usurp the powers nor encroach upon the jurisdiction of either of the others, each being esteemed equal in dignity and authority within their respective spheres.

Thus the Federal Constitution provides that the legislative power shall be vested in a Congress of the United States, the executive power in a President and the judicial power in *one* Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. It is obvious therefore, that by reason of these wise provisions the president and the courts can not make laws, likewise congress and the courts are forbidden to usurp the functions of the executive, and the courts would be justified in declaring invalid any Act of Congress or rule of the executive department which would amount to an attempted exercise of judicial power. In view of these wise provisions it can not be presumed that it was intended that the Department of Commerce and Labor should exercise the functions of the judiciary in passing finally, upon the status of an alien residing in this country in a matter where the question of the lawful residence of said alien is involved and where his right to the constitutional security of person and property is an issue, for the fact must not be lost sight of, that it is undisputed that appellee entered the country regularly in 1904 and that he subsequently declared his intention to become a citizen of the country and has since resided in the country with no record of his having crossed our borders for any purpose whatever until

November 17, 1910, when he crossed the river to Windsor and on his return again passed immigration inspection after an examination in which he presumably satisfied those officials of his right to admission into the country, in that, he was a lawful resident of the country, having several years prior thereto lawfully and regularly without any fraud or deception passed immigration inspection and been admitted into the country, and, therefore, on the date in question was not amenable to the immigration laws.

Section 1 of Act approved February 20, 1907 (34 Stat., page 898), entitled "An act to regulate the immigration of aliens into the United States," reads in part as follows:

> "There shall be levied, collected and paid a tax of Four Dollars for every alien entering the United States."

It is evident from the absence in the record of any showing that Lewis was required to pay such tax that his right to enter and resume his domicile, unrestricted even to the extent of paying the head tax levied on aliens, was unquestioned. It is noteworthy also that any possible misstatements made by Lewis on this occasion had to do with another party and had no bearing whatever on his right to enter and that he again returned to his home and that it was from his home it was sought to deport him.

Parts of Act of February 20, 1907, as amended March 26, 1910, (36 Statute, page 263) entitled an act to amend an act entitled "An act to regulate the immigration of aliens into the United States approved February 20, 1907," which parts of said statute as are here involved are quoted as follows:

> "Sec. 2. That the following classes of aliens shall be *excluded* from admission into the United States: * * * Persons likely to become a public charge; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor,

involving moral turpitude * * *. Persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose * * * ."

"Sec. 3. That the importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden; and whoever shall, directly or indirectly, import or attempt to import into the United States, any alien for the purpose of prostitution or for any other immoral purpose or whoever shall hold or attempt to hold any alien for any such purpose in pursuance of such illegal importation or whoever shall keep, maintain, control and support, employ or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, in pursuance of such illegal importation, any alien, shall, in every such case be deemed guilty of a felony * * *. Any alien *who shall be convicted* under any of the provisions of this section, shall at the expiration of his sentence be taken into custody and returned to the country whence he came or of which he is a subject or citizen in the manner provided in Sections 20 and 21 of this Act * * *."

I.

Jurisdiction of the Federal Courts on Habeas Corpus.

It will be noted that Sections 2 and 3 of Act approved February 20, 1907, are the only sections of the Act, amended by Act of March 26, 1910. It will also be noted by referring to Act approved February 20, 1907, that Section 29 of said Act reads as follows:

> "That the Circuit and District Courts of the United States are hereby invested *with full* and *concurrent jurisdiction* of all cases, civil and criminal, arising under the provisions of this Act."

It can not be urged that the courts are entirely without jurisdiction in immigration cases, or that in creating the

Department of Commerce and Labor, Congress intended to deprive the judiciary of its inherent and constitutional right to review errors of law in this particular class of cases, this right would still exist in the absence of express provision, but Congress wisely provided, in the Act itself that the Circuit and District Courts should be invested with full and concurrent jurisdiction.

In *re Panzara* (D. C.), 51 Fed., 275. It was held that the power of the federal superintendent of immigration to return passengers is confined to alien immigrants and the question as to who are of that class may be determined by the courts on habeas corpus, also that an alien who has acquired a domicile in the United States, returning from his native country after temporary absence, does not come within the class who may be denied admission.

See also in re Martorelli, 63 Fed., 437.
In re Maiola, 67 Fed., 114.
In re Ota, 96 Fed., 487.

In the case of *McNichols vs. Pease*, 207 U. S., 100, at page 109, it is held that habeas corpus is an appropriate proceeding for determining whether a person is within a particular class amenable to the statute and in *United States vs. Williams*, 173 Federal, 626, it is held that where the right of a person to enter the United States is claimed on the ground of citizenship and he is denied admission by the immigration officers, that the questions of law may be reviewed by the courts on habeas corpus.

We call attention also to *Ex parte Watchorn* (C. C. S. D., New York), 160 Federal, 1014.

The facts in this case are as follows: The alien first came to the United States in 1902 and returned to Italy his native country in 1905. He was arrested in 1908 under a warrant issued by the Acting Secretary of Commerce

and Labor, charging him with entering the United States without inspection and directing him to be brought before a board of special inquiry to show cause why he should not be deported for that reason. The acting secretary subsequently amended his original warrant so as to charge the alien of having been convicted of a felony or other crime or misdemeanor involving moral turpitude. The following is quoted from the opinion of the learned circuit judge:

> WARD, Circuit Judge, (page 1016): " * * * Passing over various objections I come to the one on which the case turns, namely, that the alien could not be found to be in this country in violation of law within three years of his entry in 1901, and was not convicted of a crime either before his original entry in 1901 or before his return after a temporary sojourn in Italy in 1905. Doubtless the determination of the immigration authorities upon all questions of fact even if made upon legally incompetent or inconclusive evidence, is final, but when the proceedings before them show indisputably that they are acting without jurisdiction, relief may be had by a writ of habeas corpus."

It was held, *Redfern vs. Halpert*, 186 Fed., 150 (C. C. A., 5).

That the decision of the Secretary of the Department of Commerce and Labor is not final and that the courts may inquire into the whole case on habeas corpus.

II.

Status of Alien Residents Who Have in Good Faith Acquired a Domicile in This Country.

A casual reading of a few late cases might give the impression that each re-entry into the United States after a temporary absence therefrom could be held to constitute an immigration into the country but a careful reading

of the cases in question or of any of the cases in which the point is raised, will not permit of such construction, for in nearly every instance the alien returned to the country of his nativity and citizenship or was guilty of having gained his first entrance fraudulently, whereas, in the case under consideration the alien had an established domicile and residence in the United States since September 20, 1904, having obtained his admission into the country legally and having maintained his domicile continuously from the date of his entry up to the present moment, it certainly can not be urged that the fact of his having crossed the river into Canada with no other object than that of meeting his wife and accompanying her to the immigration offices in this country constitutes an immigration into the country. Scores of Detroit manufacturing and business concerns maintain branch offices on the Canadian border and if every alien who is a resident of this country is under the constant surveillance and watchful eye of the immigration officers, no person whether citizen or alien could with safety cross over to Canada to his employment in any branch American concern, for he would have no assurance when going to work in the morning, that he would be permitted to return to his family at night.

The following is quoted from "Opinions of Attorney General, Volume 27, page 49:"

> "To the Postmaster General: *"
>
> "I am obliged to call your attention to the terms of Section 356 Revised Statutes of the United States, which provides that the head of any executive department may require the opinion of the Attorney General on any questions of law arising from the administration of his department. The well established practice of this department has been to consider this section as containing an implied prohibition against the giving of an opinion by the Attorney General under its terms unless upon a question of law and the question of law which has actually arisen * * *."

The following is from the opinion of the Attorney General to the Secretary of Treasury reported in Volume 22, Opinions of Attorney General, page 357:

> "* * * The word immigration means the act of immigrating, and to immigrate is to come into the country of which one is not a native, and in which one has not acquired a residence or domicile. The act of immigration is accomplished when the foreigner seeking a new home first comes into the country. After he has gained a residence with the rights incident thereto, a return to the country of his choice, following a temporary absence is not regarded as a second act of immigration."

From the opinions quoted above it appears that the question as to whether or not an alien returning to the United States after a temporary absence is an alien immigrant, is one of law, otherwise the Attorney General would not have favored the Secretary of the Treasury with an opinion and the opinion given to the Secretary of the Treasury unequivocally states that the alien on his return to the country after a temporary absence can not be held to be an alien immigrant.

As pointed out by Judge Denison inferences of law from undisputed facts are to be finally drawn by the courts and not by the department and two cases from the Second Circuit are cited: "Ex parte Saraceno, 182 Federal, 955; in re Nicola, 184 Federal, 322." (See Record, page 29, C. C. A., 2.)

In the case of *Redfern, et al., vs. Halpert*, 186 Federal, 150, C. C. A., 5th, the court said:

> "I have no doubt that the relator is a prostitute and that she was not a prostitute when she came to New York from Russia. There is no doubt that the Secretary of Commerce and Labor, would have the right to order her deported at any time within three years after her arrival, if she had been brought here for immoral purposes or was found within the same

period in a house of prostitution, therefore, the only question to be determined in this case is when does the three-year period begin to run * * *. I find nothing in the law, making the decision of the Secretary of Commerce and Labor final and I am satisfied I have the right to inquire into *the whole case* * * *."

"It is contended by respondent that in the instant case, the relator having come to the United States as a minor could not be considered as having come here with the intention of acquiring a domicile and therefore, has no status as a resident. I can not agree with this view of the case. It seems to me that no greater hardship could be occasioned than by deporting an alien who had come to this country at a tender age and had lived here until after majority. Deportation in such case is tantamount to exile. In my opinion the law must be held to mean that the three years' period within which an alien may be deported begins to run from the date of his first entrance into the country and temporary absence with the intention to return cannot interfere with his status as a resident nor give the immigration authorities the right to deport him."

The opinion of the learned circuit judge as above quoted not only covers the question as to when the three-year period within which an alien may be deported begins to run but touches also on that other very important question, namely the right of the courts to review errors of law of the Department of Commerce and Labor and the right the court has to inquire into the whole case.

Rogers vs. United States, 152 Fed., 346, C. C. A., 3rd Circuit.

"We are clearly of the opinion that an alien who has acquired a domicile in the United States cannot thereafter and while still retaining such domicile, legally be treated as an immigrant on his return to this country after a temporary absence for a specific purpose not involving a change of domicile. The term 'immigrant' as applied to him is a palpable

misnomer. * * * We think, however, that, notwithstanding the generality of the terms employed in the section, Congress did not intend that exclusion under the Act on account of loathsome or dangerous contagious disease should extend to aliens domiciled in this country. In reaching this result the body of the Act has been considered in its entirety in connection with its title and in the light of other statute *pari materia*. The title is 'An act to regulate the immigration of aliens into the United States.' Certainly if taken alone, it would indicate the inapplicability of the Act to the case of Buchsbaum. It is well settled that where the language of a statute is ambiguous or otherwise doubtful, or being plain a literal construction would lead to such absurdity, hardship or injustice, to render it irrational to impute to the law making power a purpose to produce or permit such result, the title may be resorted to as tending to throw light upon the legislative intent as to its scope and operation. *United States vs. Fisher*, 2 Cranch., 358, 386. 2 L. Ed., 304. *Holy Trinity Church vs. United States*, 143 U. S., 457. *Coosaw Mining Company vs. South Carolina*, 144 U. S., 550. Further, the body of the Act contains provisions of such a character as, in connection with the title, to lead us to conclude that the statute was not intended to apply to aliens having their homes in the United States."

The several cases cited by counsel for appellant in support of the contention that the three (3) year period within which an alien may be deported dates from re-entry into the country after a temporary absence are with the exceptions of Chinese cases (which obviously do not apply) decisions that were before the Circuit Court of Appeals, Fifth Circuit, 186 Federal, 150, March 14, 1911, when the case of *Redfern vs. Halpert* was passed upon.

We quote the following from the holding of the judge *a quo* which was also the holding of a majority of the judges in the C. C. A.:

"* * * In my opinion the law must be held to mean that the three-year period within which an

> alien may be deported begins to run from the date of his first entrance into the country and a temporary absence with the intention to return, can not interfere with his status as a resident or give the immigration authorities the right to deport him."

This case, it will be noted, in effect affirms the holding of the District Court in the case of *Sprung vs. Morton,* 182 Federal, 330, which case was in February, 1910, before the Circuit Court of Appeals, Fourth Circuit, 187 Federal, 903, and reversed.

We quote the following, however, from the opinion of the learned district judge in the case of *Bloom vs. Morton,* decided at the same time.

> "The courts must have the right to determine when persons have once been admitted into the country, apparently lawfully and properly whether they belong to the inhibited class or not. The Secretary of Commerce and Labor may have the right to say who shall be admitted, and as to them, doubtless his determination is final but, when persons have once become residents and citizens of this country, surely as to them he cannot have such authority and power, and the courts be deprived of all jurisdictions in matters effecting their liberty and right to remain in the country."

It was said with reference to the Sprung case:

> "The facts and testimony as viewed by the court in this case sustain the contention made by the petitioner: That she is the wife of an American citizen, and hence herself a citizen, and not a deportable subject. She came to this country as a single woman, some 15 years ago, being of Austrian birth. She did not belong to any inhibited class and her entrance was lawful, * * *."
>
> "The authorities are clear that being the wife of an American citizen her citizenship is that of her husband and she can not be deported, as they are also that the re-entry of an alien, once lawfully an inhabitant of the country, into the country, after

only a temporary absence, does not make her subject to deportation."

The Circuit Court of Appeals, Fourth Circuit, while reversing the District Court as to the limitation of time within which the department could act did not deny the right of the courts to review decisions of executive officials on questions of law.

Counsel for appellant also call attention to the following cases cited by Judge Denison:

United States vs. Aultman Co. (D. C.), 143 Fed., 923, affirmed in 148 Fed., 1022 (C. C. A. 6th);

In re Buschbaum (D. C.), 141 Fed., 221, affirmed in 152 Fed., 346 (C. C. A., 3rd); Rodgers vs. United States.

United States vs. Nakashima, 160 Fed., 842 (C. C. A., 9th.)

The facts in the Aultman case are that Hermann, whom it was sought to bring under the alien contract labor law came to this country from Germany in 1891 and remained in the country until the middle of July, 1902, when he went to Canada to help break a strike there. He remained in Canada two (2) weeks when he was called upon to assist in breaking a strike at Canton, Ohio. The questions passed upon by the District Court for the Northern District of Ohio and affirmed by the Circuit Court of Appeals, Sixth Circuit, was whether he was an immigrant within the meaning of the statute and amenable to the Contract Labor Laws when returning to the country from Canada after having left the United States for a period of two (2) weeks.

The learned district judge said:

"The ubroken current of authority is that he was not an immigrant within the meaning of this statute.

I doubt whether he would be an immigrant within the meaning of any statute."

As has been noted, this case was affirmed in 148 Federal, 1022 C. C. A., 6.

Counsel for appellant also call attention to the Buchsbaum case affirmed by the C. C. A., 3rd Circuit, *Rodgers vs. United States* and the *Nakashima* case (C. C. A., 9th Circuit.)

We quote the following from *Rodgers vs. United States:*

"* * * We are clearly of the opinion that an alien who has acquired a domicile in the United States can not thereafter and while retaining such domicile legally be treated as an immigrant on his return to the country after a temporary absence for a specific purpose not involving a change of domicile."

"In the case of *in re Maiola* (C. C.), 67 Fed., 114, Judge Lacombe held that the statutes relating to alien contract laborers including the act of March 3, 1891, would not any of them apply to an alien residing in the United States and returning here after a temporary absence abroad * * * ."

"* * * We are satisfied that Buchsbaum was not an alien immigrant at the time of his deportation under the provisions of Act of March 3, 1903, or any other statute of the United States. We are not aware of any decision in conflict with this conclusion."

UNITED STATES VS. NAKASHIMA.

(Circuit Court of Appeals, Ninth Circuit, February 27, 1908.) 160 Federal, 842.

Appellee in this case was a subject of the Emperor of Japan but had been for four years and more a resident of the United States, having in May, 1902, come from the Empire of Japan to the territory of Hawaii as an immigrant. From Hawaii he went to California where he established a home for himself and wife and remained there until November, 1904, when he returned to Japan to serve in the army. He

left his wife in California during his stay in Japan. When discharged from the army he proceeded to return to California, it being his intention to make his home there.

He stopped at Honolulu on his way back to California to visit a brother and sister who resided there and at Honolulu he was questioned by the immigration inspector and an examination of his mental and physical condition made by an officer of the United States marine hospital service, which officer certified that he was afflicted with a dangerous, contagious disease, to-wit, trachoma, whereupon the board, called for the purpose of giving appellee a hearing, determined that he was afflicted with a dangerous, contagious disease and ordered that he be deported to Japan. He appealed from the decision to the Secretary of the Department of Commerce and Labor and the appeal was dismissed, the secretary holding that no appeal was permissible.

The following is from the opinion of Gilbert, Circuit Judge, page 844:

> "The question first presented is, whether the appellee is of the class of aliens who are to be denied admission into the United States under Act March 3, 1903, C. 1012 32 Stat., page 1213, which excludes from admission all aliens who are afflicted with dangerous, contagious diseases. That act is amendatory to Act March 3, 1891, C. 551 26 Stat., 1084, which in its terms is amendatory of prior acts. The act of 1891 had uniformly been held to apply solely to alien immigrants, and not to affect the rights of alien residents."
>
> "* * * It is true the act of March 3, 1891, is in terms directed against all aliens, and does not, in Section 2, which defines the class of aliens to be excluded from admission employ the word immigrant or immigration nor does it employ those words in Section 9 which imposes a penalty on any person or transportation company bringing to the United States any alien afflicted with a loathsome or dangerous contagious disease. If the act were unaffected by the prior legislation, of which it is amendatory, there might be ground for saying from its inclusive language, that it is directed against all aliens coming to the United States; but

aliens have always been allowed to reside in the United States and acquire property here, while at the same time maintaining their citizenship in the country from which they came, and their right to return to the United States, after having temporarily left the same with the intention to return, has always been recognized * * *."

"That it is directed against alien immigrants and not against alien residents, has been decided in the following cases:

In re Buchsbaum (D. C.) 141 Federal, 221.

United States vs. Aultman (D. C.) 143 Federal, affirmed 148 Fed., 1022 (C. C. A., 6th) 922.

Rogers vs. United States, 152 Federal, 346, 81 C. C. A., 454 * * *."

Counsel for respondent refer to the above case and say:

"The court again was careful to explain that it assumed jurisdiction only because Nakashima had not been allowed an appeal to the Secretary of Commerce and Labor."

The following is quoted from the opinion:

"We are of the opinion that Section 25 of the Act of 1903 does not exclude jurisdiction of courts habeas corpus where the alien is denied the right of appeal upon a question effecting his right *to land* and upon which he should be heard."

It will be noted, however, that in this case as in the case of *Lem Moon Sing*, 158 U. S., 538, also cited by the District Attorney, the Court, in commenting on the finality of the decision of the department, referred to the same in connection with the decision of the immigration authorities on the right of the alien to land, not his right to remain in the country, after having been regularly admitted. In other words, there was involved the right to *exclude* an alien admittedly belonging to the excluded classes, not the right to deport an alien resident.

Exparte Petterson (D. C.) 166 Fed., 539.

The opinion was written by Purdy, District Judge. The following is quoted from his opinion as appearing on page 547:

> "Looking at the whole record, and making due allowance for the summary character of the proceedings before the immigration inspector when the petitioner was examined the court is unable to say that the petitioner's right to remain in the United States for the reason that she had acquired a domicile therein prior to her returning to Sweden has been established beyond any room for dispute or doubt, so as to warrant this court in holding that the Assistant Secretary of Commerce and Labor was mistaken with reference to a pure question of law. I, therefore, hold that the evidence contained in the record was of such a character as to justify the Assistant Secretary of Commerce and Labor in finding, *as in law* I assume that he found, that the petitioner did not belong to that class of aliens which by reason of acquiring a domicile in this country should be permitted to return unaffected by our immigration laws."

It is evident from the opinion of Judge Purdy as quoted above that the court had the right to review an error of law and also that there are a class of aliens who by reason of having acquired a domicile in this country are and should be permitted to return to the country unaffected by the immigration laws.

The following is also quoted from the opinion of the learned District Judge in the above case on pages 546 and 547:

> "In my opinion the petitioner has totally failed to make out a case which indisputably brings her within that class of aliens which the decisions in the Rogers and Nakashima cases, supra, hold to be beyond and outside of the immigration law of 1903. The burden was upon the petitioner to show, when she had the opportunity before the immigration officers, that she had acquired a domicile in the United States, which would necessarily arrest all further proceedings instituted with a view to her deportation."

Lau Ow Bew vs. United States, 144 U. S., 47, at pages 59, 61 and 63.

This is a writ of *certiorari* for the review of the judgment of the Circuit Court of Appeals for the Ninth Circuit affirming the judgment of the Circuit Court of Appeals for the Northern District of California in case of habeas corpus which determined that Lau Ow Bew, the appellant, is a Chinese person forbidden by law to land within the United States, and has no right to enter or remain therein, and ordered that he be deported out of the country.

It was stipulated and agreed that the following are the facts with reference to Lau Ow Bew's attempted entry into the country in 1891.

> "That on the 30th day of September, A. D. 1890, the said passenger departed from this country temporarily on a visit to his relatives in China with the intention of returning as soon as possible to this country, and returned to this country by the steamship Oceanica on the 11th day of August, A. D. 1891."

Section 6 of the Act of May 6, 1882, contains the provision that every Chinese person other than a laborer who shall be entitled to come within the United States shall produce a certificate from the Chinese Government or such other foreign government, at which time the Chinese person shall be a subject, identifying the alien, etc., as a person entitled to enter the country. It was held in the case of *Wong Tare vs. United States*, 181 Fed., 313, that by reason of the Chinese Exclusion Act Chinese laborers stand in a class by themselves but that Chinese merchants not coming under the Chinese Exclusion Act are subject to the immigration laws applicable to other aliens.

Mr. Assistant Attorney General Parker in his statement of facts in the Lau Ow Bew case said:

> "The petitioner left the United States September 30, 1890, and came into the Port of San Francisco, August 11, 1891, having been out of the United

> States more than ten months. During this time, he was living in the country of his birth and had resumed his domicile there, and had thus voluntarily placed himself within the operation of the statutes of the United States, excluding Chinese immigrants."

It will thus be noted that the Attorney General based his contention that petitioner had placed himself within the operation of the statutes excluding Chinese immigrants on the ground that he had returned to his native country and had resumed his domicile there.

Mr. Chief Justice Fuller delivered the opinion of the court and after discussing the question of jurisdiction, said:

> "We are brought, therefore, to the consideration of the questions arising upon the record. Lau Ow Bew came to the United States in 1874, and has been for 17 years a resident thereof, and domiciled therein, and during that period has carried on a wholesale and mercantile business in the City of Portland, Oregon. On September 30, 1890, he went to China for the purpose of visiting his relatives there with the intention of returning as soon as possible * * *. Does the act apply to Chinese merchants, already domiciled in the United States, who having left the country for temporary purposes *animo revertendi* and seek to re-enter it on their return to their business and their homes. Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention and if possible, so as to avoid an unjust or absurd conclusion. *Church of Holy Trinity vs. United States*, 143 U. S., 457; *Henderson vs. Mayor of New York*, 92 U. S., 259; *United States vs. Kirby*, 7 Wall, 482; *Oules vs. National Bank*, 100 U. S., 239."
>
> "* * * Chinese merchants domiciled in the United States and in China only for temporary purposes *animo revertendi* do not appear to us to occupy the predicament of persons 'Who shall be about to come to the United States,' when they start on their return to the country of their residence and business * * *. The general terms used should be limited to apply to them, and they would evidently be those

> who are about to come to the United States for the first time * * *. We are of the opinion that it was not intended that commercial domicile should be forfeited by temporary absence at the domicile of origin * * *."

Appellee entered the country at the Port of New York from Russia in 1904, his residence in this country has been continuous and uninterrupted since that time. It is true as has been stated *supra* he crossed the river into Canada November 17, 1910. He, however, as has also been stated, was admitted by the immigration inspector and returned to his home. It is evident from all legislation with reference to aliens domiciled in this country, that their right to acquire a home, and to accumulate property, and their right also to security under the laws of the country is not open to question, indeed as late an enactment as Act approved March 2, 1907, (34 Stat. 1228) provides:

> "That the Secretary of State shall be authorized, in his discretion, to issue passports to persons not citizens of the United States as follows: Where any person has made a declaration of intention to become such a citizen as provided by law and has resided in the United States for three years a passport may be issued to him, entitling him to the protection of the government in any foreign country." * * * Such passport shall not entitle the holder to the protection of the government in the country of which he was a citizen prior to making such declaration of intention."

Thus the right of an alien, resident of this country, to ask for and receive the protection of the government after he has resided in the country three years and has declared his intention to become a citizen of the country, while sojourning in a foreign country other than the country of his citizenship.

Appellee declared his intention of becoming a citizen of the United States, May 16, 1906. (See R., pages 17 and 18.) There is no reason to presume that he would not have

been granted a passport by the Secretary of State for protection of this government while in a foreign country, had he made application for same, and while this fact does not, it is conceded, determine the status of an alien in this country in such cases, it does in a measure determine his status as a resident of this country while in a foreign country and recognizes that on the broad principle of public policy he has acquired some rights akin to citizenship which the government recognizes, while he is abroad in the protection it affords him, and which it can not consistently disregard when he attempts to return to his own home here or while living peacefully in the country.

III.

Errors of Law by Executive Departments, May be Reviewed by the Courts.

It cannot be successfully maintained that Congress has ever intended or attempted the enactment of any statutes to deprive the judiciary of the inherent right therein vested to review errors of law by executive departments; to do so would be contrary to our whole scheme of government and would defeat the object of the framers of the constitution in providing that there shall be three separate and distinct departments of government, indeed the authorities appear to be unanimous in holding that erroneous conclusions of law by the Department of Commerce and Labor as of all other executive branches of our government are subject to judicial review.

As was said *Botis vs. Davis*, 163 Federal, 1001:

> "In no case, I think, has a departmental decision, not expressly made conclusive, ever been held to be so, as appears by Justice Brewer's dissenting opinion in the Juy Toy case, except that mere questions of fact will not be judically reviewed. Mistakes of law by executive officers are freely re-examined by the courts."

Gonzales vs. Williams, 192 U. S., 1.

Isabelle Gonzales, a citizen and native of Porto Rico, on arriving at a port in the United States was detained for deportation by the Commissioner of Immigration on the ground that she was an alien to be excluded within the meaning of the Act of March 3, 1891. The court recognized its jurisdiction to review the case and held:

That if she was not an alien immigrant within the intent and meaning of Act March 3, 1891, the Commissioner had no power to detain her and the final order of the Circuit Court must be reversed.

Counsel for appellant cite the case of *Bates & Gyld Company vs. Payne*, 194 U. S., page 106, and call attention to the fact that:

> "Where the law has confided to a special tribunal authority to hear and determine matters arising in the course of its duties, a decision by it within the scope of its authority as to questions of fact is conclusive against collateral attack."

The following is quoted from the opinion of the court:

> "That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact or of law alone, his action will carry with it a strong presumption of its correctness and the courts will not ordinarily review it although they may have the power and will occasionally exercise the right of so doing."
>
> "Upon this principle and because we thought the question one of law rather than of fact and one of great general importance, we have reviewed the action of the Postmaster General."

It seems that in reviewing this case, though, Justice Brown may be understood as saying that questions of fact by an executive department are conclusive and can not be reviewed by the courts. It is quite as clear that in his opinion questions of law are not conclusive and are subject to judicial review.

Counsel also cite *United States vs. Arredando*, 6 Pet., 691. This case while holding that where the power or jurisdiction is delegated to any public officer or tribunal over a subject matter and the acts done are binding and valid to the subject matter, it also holds that if "binding and valid" the officer or tribunal must have acted within the power conferred by statute. This case involves the title to land while the present case deals with the inherent and constitutional rights of an individual. It is proper also to note that in the present case the department was not acting within the power conferred upon it by ordering Lewis deported. As has been shown Section *2* of the Immigration Act was not applicable to him and Section 3 provides for deportation only in event of conviction.

The same applies to *Quinby vs. Conlan*, 104 U. S., 420, the court expressly holding that where a question of law is involved the courts have the right to interfere.

UNITED STATES VS. WILLIAMS.

(District Court, Southern District, New York, Oct. *29, 1909*) *173* Federal *626, pp. 627* and *628.*

It was held in this case, the opinion being written by Hand, District Judge, that where the right of a person to enter the United States is claimed on the ground of citizenship and he is denied admission by the Immigration Officers and the question of his citizenship depends on a question of law the same may be reviewed by the courts on a writ of habeas corpus.

See Ex parte Koerner, 176 Fed., 178.

Botis vs. Davies, 173 Fed., 996.

Gonzales vs. Williams, 192 United States, page 1, 24 Supreme Court, 171; 48 L. Ed., 317.

Ex parte Watchorn, C. C., 160 Fed., 1014, *supra.*

This case supports the contention that the courts are not precluded from reviewing errors of law on the part of the Department when it is sought to show that the person ordered deported is not within the inhibition of the statute.

See also United States ex rel Huber vs. Sibray, 178 Fed., 144.

The general rule is well recognized:

> "That decisions of the officers of departments upon questions of law do not conclude the courts, and they have no power to grant relief to an individual aggrieved by an erroneous decision of a legal question by department officers."
>
> School of Magnetic Healing vs. McAmnulty, 187 U. S., 94, 108; 23 Supreme Court, 33.

Mr. Justice Pecham:

> "The Land Department of the United States is administrative in its character and it has been frequently held by this court that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department and its judgment thereon is final. *Burfenning vs. Chicago, etc. Ry. Co.*, 163 U. S., 321; *Johnson vs. Drew*, 171 U. S., 93; *Gardner vs. Bonestell*, 180 U. S., 362. While the analogy between the above cited cases and the one before us is not perfect, yet even in them it is held that the decisions of the officers of the department upon questions of law do not conclude the courts and they have power to grant relief to an individual aggrieved by an erroneous decision of a legal question by department officers."

The foregoing is sustained in a recent opinion of the Circuit Court of Appeals for the 2nd Circuit, in re Nicola, 184 Fed., 322.

EX PARTE KOERNER.

(CIRCUIT COURT, E. D. WASHINGTON, DECEMBER *15, 1909.*) *176* FED., *478.*

In this case the opinion is written by Whitson, District Judge, and from the facts as stated in opinion it appears that the petitioner entered the country on the 12th day of April, 1909, and was thereafter convicted of the crime of embezzlement in Austria, the country from which he came on the 8th day of October, 1909. He was detained for deportation upon a warrant issued November 9, 1909, by the Acting Secretary of Commerce and Labor under the Act of February 20, 1907 (34 Stat., 898). The clause of the statute under which the right to deport is claimed appears in Section 2 of the Act and reads:

> "* * * Persons who have been convicted of or admitted having been convicted of a felony or other crime or misdemeanor involving moral turpitude * *."

The following is quoted from the opinion of Judge Whitson as found on page 479:

> "The petitioner was sentenced to imprisonment in the penitentiary and, indulging the presumption that the law of the foreign jurisdiction is the same as this country, he was guilty of the commission of a felony and of a crime involving moral turpitude; but it affirmatively appears that he was convicted after he left Austria, and it not appearing that he has admitted the commission of the offense he is not brought within the statute, while the courts are bound by findings duly made by the executive branch in matters of this kind, (*United States vs. JuToy*, 198 U. S., 253, 25 Sup. Ct., 644; *Pearson vs. Williams*, 202 U. S., 281, 26 Sup. Ct., 608; *Oceanic Navigation Company vs. Stranahan*, 214 United States 321, 20 Supreme Court 671) they can not properly refuse relief, where upon the admitted facts it appears as a matter of law that the person sought

to be deported is not within the inhibition of the statute. *Gonzales vs. Williams,* 192 U. S., 1."

DEBRULER VS. GALLO

(CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.)
184 FED., *566.*

Ross, Circuit Judge. The following is quoted from the opinion.

> "The records contain a review by Inspector Fischer in his report made to the Department of Commerce and Labor of the evidence given in the cause; and his finding of fact made therefrom, and ultimate decisions of the Department, first herein set out. Under such circumstances we do not see how it can be properly held that the appellee was not given a fair hearing, by the officers of that department. Mistakes of law by executive officers are, of course, reviewable by the courts."

IV.

Finality of the Decisions of the Department of Commerce and Labor.

It being conceded, as we assume it must be, that errors of law by the Department of Commerce and Labor may be reviewed by the courts, it cannot be urged that the decisions of the Secretary of the Department on all questions relating to aliens are conclusive and final.

It is equally clear that any authority the Secretary may have must be found in the statute.

Certain it is that his conclusions of law are subject to review by the courts, and if erroneous, cannot be sustained.

The statute makes no provision for the deportation of an alien because he is thought to have imported a woman

for an immoral purpose, unless as provided in section three of the Act, the woman imported is an alien, and the party importing her has been convicted of so doing which under the law, in such case, constitutes a felony.

Ex Parte Saraceno (C. C.), 182 Federal, 955.

In this case the court exercised its authority to review the decision of the Secretary of Commerce and Labor.

> WARD, C. J. "The authority of the board, and the Secretary on appeal, to order the deportation of alien immigrants is confined to such aliens as come within the classes excluded by Section 2 * * * *. It is impossible to avoid the conclusion, that the real ground for the order is that the immigration authorities think the alien an undesirable citizen, which is a class not excluded by the immigration laws."

In re Nicola, 184 Federal, 322 (C. C. A., 2), Coke C. J.

> "It is conceded that the principal question involved is the same in each of these appeals, that question is whether the relators are citizens of the United States. If they are citizens it is manifest they cannot be refused admission into this country under the laws relating to aliens."

Botis vs. Davies (D. C.), 173 Federal, 996.

Botis was a Greek 18 years of age, held for deportation under the Contract Labor Statute. On November 11, 1908, a warrant for his arrest was issued setting forth that Botis was a contract laborer and a member of the excluded classes, in that, he migrated to this country pursuant to an offer, solicitation, promise or agreement made previous to such migration to perform labor herein. He was arrested and a hearing had, a copy of the evidence being attached to the return. The evidence was submitted to the Secretary of Commerce and Labor and being satisfied that Botis was

a member of the excluded classes in that, he is a contract laborer, the Secretary issued his warrant directing his return to his native country. He then sued out habeas corpus and the case was heard on the petition and return.

The following is quoted from the opinion of Sanborn, District Judge:

> "America means something to the immigrant whether he is from England or Sweden, little Russia or Armenia. Many a man now representing the best American manhood was, when he came to this country, though then perhaps of full age and stature, utterly unable to read or write. No industrious self-supporting immigrant should be cast out because of a technical infraction of a loosely drawn statute which has often been interpreted not to mean what it says * * *. Banishment, as Justice Brewer has well said, is a punishment of the severest sort and should not be inflicted in a case like this unless the law positively and equivocally demands it.
>
> "But it is said that these questions are wholly reserved to the political department with which the courts have nothing to do, and this is often a question of difficulty. There is nothing in the law which expressly makes the decision of those officers conclusive. Section 25 of the Acts of 1903 and 1907 both provide that when an alien is refused admission (never being allowed to land or only pending further examination) the decision of the appropriate immigration officials if adverse to the admission of such alien, shall be final unless reversed on the appeal to the Secretary of Commerce and Labor. Such appeal is provided for in the same section, but in the case of aliens who have been permitted to land and become in all respects subject to our jurisdiction and part of our population, but who are found within a limited time to fall within the excluded class, there is no express provision that the decision of the Department should be final."

Counsel for appellant have cited in their brief, several cases in which they point out, that it is held that the Secretary's warrant directing deportation is final on all questions.

A perusal of these cases will disclose, however, that they do not apply to the present case because they refer either to Chinese, which (*Rogers vs. U. S.*, 152 Federal at page 352) are *sui generis*,

> "involving the judicial or administrative enforcement of a particular policy on the part of the United States having as its object the prevention of competition between Chinese labor and other labor in the country,"

or to cases where *exclusion* rather than *deportation* is attempted,—and the reasons for excepting these classes of cases are apparent.

In the case of the Chinese immigrant it is obligatory upon him to prove by proper certificate, etc., that he is not in the country illegally if domiciled here. No presumption in his favor arises. His presence in the country raises a question as to its legality in view of the somewhat drastic exclusion Act. To one within the Act no rights could be acquired in the country, for in every such case his entry must have been illegal, and of aliens excluded or not permitted to enter in the first instance, the court has said (*Botis vs. Davies*, 173 Federal, at page 1002):

> "In one case the alien is stopped at our borders, and his entry arrested. He is simply turned back after an appeal and hearing, by an order which wholly concludes his rights. But in the other he enters the country, becomes a part of our population, perhaps acquires a domicile, pays taxes and establishes himself in business. * * * To the immigrant who never enters it may indeed be a great disappointment to be turned back; but to one who has earned a place here, who is supporting himself, possibly his family, with perhaps a home here, deportation is a punishment most drastic and severe. One may be rejected by peremptory order, final in its nature; the other is entitled to judicial investigation."

The strongest case cited by counsel for appellant on the question of the finality of the decision of the Department of Commerce and Labor would appear to be the case of *United States vs. Ju Toy*, 198 U. S., 253, but it will be observed that this case dealt with a statute expressly making such decisions final; the same is true of the other cases cited. Section 25 of the Immigration Act of February 20, 1907, does not apply to this case, however, and it appears from a careful reading of the cases, that where the case is not covered by the statute the decision is not conclusive. In passing upon a *positive provision* as in the Ju Toy, and other cases cited by appellant's counsel, the court was compelled to hold that "Adverse decisions should be final," as provided in the statute.

These aliens were stopped at the border whereas Lewis established his right to enter to the satisfaction of the officials—the same statute does not apply to the two classes of cases.

In the Rodgers case the learned District Judge was careful to quote that portion of Section 25 which reads as follows:

> "Such boards shall have authority to determine whether an alien who *has been duly held* shall be allowed *to land* or be deported."

The case of *Lem Moon Sing vs. United States*, 158 U. S., 541, cited by District Attorney and from which he quotes the opinion of Mr. Justice Harlan, came squarely under Act of August 18, 1894, which provided:

> "That where an alien is excluded from admission into the United States * * * the decision of the appropriate immigration or custom officers if adverse to the admission of such alien, shall be final, unless reversed on appeal."

It is obvious that it is not aplicable to the instant case for the reason that appellee was not excluded from admission.

Davis vs. Manolis, 179 Fed., 818; C. C. A., 7.

> "Nevertheless final determination of the statute applicable to the case and interpretation of the grant of power therein can not rest with the executive officer under any authority cited; nor can such finality of executive decision have sanction under our systems of government. Whatever may be the powers even of judicial nature vested in such officials for needful and summary enforcement of the governmental policy, we believe ultimate decisions of the fundamental questions above cited must remain with the courts."

Counsel for appellant have also quoted part of Section 25 of said Immigration Act as follows:

> "That in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made the decision of the appropriate immigration officers, if adverse to the admission of such alien shall be final, unless reversed on appeal to the Secretary of Commerce and Labor."

That this section does not determine the finality of the decision of the Secretary of Department of Commerce and Labor and that the same is inapplicable to the instant case will at once appear. It is not the right to come into the country that is here involved and consequently it is not necessary to consider the finality of the decision of the Secretary of the Department of Commerce and Labor in a case where an alien is excluded. Lewis was not *excluded* either in 1904 or 1910. There is not involved in this case the question of the right of an alien to enter or the finality of the decision of the department with reference thereto, but there is involved the right of an alien domiciled in the country, who having entered the country and regularly and satisfactorily passed the examination of the immigration officials to protection and safety in person and property

which right is guaranteed to all residents of the United States under the guarantees of the Constitution and the laws of the land.

V.

Interpretation of Statutes.

It will be noted from the record in this case that little or no evidence was offered before the immigration officers except to the charge of Lewis having brought a woman into the country for an immoral purpose and that little or no testimony was adduced as to any other allegations in the warrant, namely, that he had been convicted of or admitted having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States; that at the time of his entry he was likely to become a public charge or that he is unlawfully in the United States having entered without inspection. That the real ground on which Lewis was examined by the immigration officers and his deportation ordered by the Department of Commerce and Labor are found in Section 3 of the Act, is not only evident from the foregoing, but from the wording of the order to show cause why he should not be deported. (See R., page 4.)

> "Said Samuel Lewis, etc., was then informed that the purpose of said hearing was to afford him an opportunity to show cause why he should not be deported to the country from which he came." Not why he should not be *excluded* from entering the country.

It being thus admitted that Lewis was already in the country and that being a resident of the country he could not be excluded under Section 2 of the Act which reads as follows:

> "The following classes of aliens shall be excluded," etc., etc.

Appellee being lawfully in the country and a resident of the country and never having been held at the border could not be excluded under Section 2, but must necessarily come within Section 3, which provides for deportation only in case of conviction.

The following is an excerpt from the opinion of the learned District Judge (Record, page 27):

> "I am unable to find in the immigration law any authority whatever for deporting an alien because he has imported a woman for immoral purposes. Such importation might be fully proved, or, indeed, might be admitted by the alien, and still the department would have no jurisdiction to deport. It has jurisdiction only under Section 3, and that exists only in case of conviction.
>
> "I am led to this conclusion by study and comparison of Sections 2 and 3. Section 2 *excludes* from admission into the country a person who attempts to bring in a woman for immoral purposes. In terms, it applies only to excluding one who is attempting to get in, but it has been construed to be effective, by relation, in deporting those who had entered; and I accept that construction. Whether it could, in any event and standing by itself, be a basis for deporting an alien who had established and maintained a domicile in this country for six years, and in a case where the offense had nothing to do with the entry of the person to be deported, it is not necessary in this case to decide.
>
> "By Section 3, Congress has provided that where the woman imported is an alien and the person importing is an alien, a felony is committed; and that the person who is convicted of this felony may be deported. Under the general rules of statutory construction (*Noyes, C. J., in Wong Tun vs. U. S.*, 181 Fed., 313) the intent seems clear that out of the general class covered by Section 2, Congress has selected a particular class named in Section 3 and submitted it to a severe punishment, but, in connection therewith, has limited the right to deport to cases where there is a conviction.
>
> "The right to prosecute criminally and the right to deport are inconsistent, as concurrent rights; they

can not both be exercised at the same time; Congress saw the necessity of making the proceedings successive; and it clearly, and probably purposely, made the second step depend on the result of the first step."

The opinion of Judge Denison is fully supported by the case cited. *Wong Tun vs. U. S.*, 181 Fed., 313; C. C. A., 2nd Circuit.

This is a case decided June 14, 1910, reversing the District Court (176 Fed., 933). The facts briefly stated are: That the petitioners who are Chinese persons were taken into custody under warrants issued by the Department of Commerce and Labor charging them with being aliens unlawfully in the United States in that they entered in violation of Immigration Act of February 20, 1907. It was brought out at the hearing that the petitioners were laborers and therefore came within the Chinese Exclusion Law.

The opinion was written by Noyes, Circuit Judge.

"NOYES, Circuit Judge, '*Generalia specialibus non derogant*' is an elementary rule governing the interpretation of statutes. A later general statute which in its most comprehensive sense would include that which is embraced in an earlier particular enactment, does not, as a general rule, repeal the latter, but applies only to such cases within its general language as are not within the provisions of the particular Act. '*The general statute is read as silently excluding from its operation the cases which have been provided for by the special one.* Endlich on the Interpretation of Statutes, Section 223.'

"The application of this rule or interpretation is decisive of the present case. The Chinese Exclusion Acts deal with the removal of Chinese laborers unlawfully in this country and prescribe the procedure to be followed in deporting them. These statutes constitute comprehensive particular legislation with respect to that subject. It follows then, under the rule of interpretation, that the Immigration Act—the later general statute—although in its terms in-

cluding all aliens, applies, only to those Chinese aliens who are not subject to removal by the particular Chinese enactments and this is a case especially for the application of the rule, because the Immigration Act expressly provides that it shall not be construed as repealing, altering, or amending the existing laws relating to the exclusion of Chinese persons.

"It appears from the meager record that these petitioners are Chinese laborers and—if the government's contentions be well founded—that they are aliens and subject to deportation in accordance with the provisions relating to the Chinese. As we understand it, the government contends that the petitioners may be deported under either the Chinese Act or the Immigration Act, not that the former is inapplicable.

"If this contention of the government be well founded, we have two statutes in force prescribing different methods of procedure for the deportation of alien Chinese laborers. And the Immigration Act—if the government chose to act under it—would supersede the Chinese statute because it is evident that no Chinese laborer could come into this country unless he entered surreptitiously and without inspection. But any interpretation of the statutes would conflict with the rule which we have considered, under which both statutes do not apply to the same thing, but the later applies to those cases within its general language not within the provisions of the earlier; that is, as already pointed out, the Chinese statutes prescribe the procedure to be followed in removing alien Chinese laborers, while the Immigration Act states the procedure for the deportation of all other aliens unlawfully in this country including Chinese other than laborers. We think that these petitioners, being subject to removal according to the provisions of the Chinese Exclusions Laws, are not subject to removal in accordance with the procedure of the Immigration Act.

"This conclusion makes no distinction in favor of the Chinese. Chinese laborers are excluded by the Chinese Act. All other Chinese persons, not being excluded by that Act, are subject to the provisions of the Immigration Act. A Chinese laborer with or without a loathsome disease, cannot enter at all.

The Chinese Act governs the case. A Chinese merchant would not be excluded by that Act, but would be excluded by the Exclusion Act if he had a loathsome disease or other disability prescribed in such enactment.

"We fully approve the decisions in *Ex Parte Lee Sher Wing*, D. C., 164; Federal, 506, that the provisions of the Immigration Act excluding alien immigrants afflicted with certain diseases, etc., are applicable to Chinese immigrants otherwise entitled to admission. The distinction upon which the application of that Act depends lies in the difference in Chinese persons; between those who are, and those who are not, subject to Chinese Exclusion Laws. And we find no case in which the conclusions, as distinguished perhaps from general references to Chinese persons in the opinions, are inconsistent with this distinction.

"For these reasons, we hold that, as these petitioners appear to be subject to deportation in accordance with the enactments particularly relating to Chinese, they are not subject to removal under the provisions of the Immigration Act, and consequently are unlawfully held by process—either of arrest or deportation—issued under such act."

See Endlich on Interpretation of Statutes Sec. 223, at page 299.

VI.

Conclusion

It is not disputed that the courts have authority to, and do review errors of law by Executive Departments, including the Department of Commerce and Labor. As has been said heretofore, in all cases where the courts have held that the decision of the Department of Commerce and Labor is final, on appeal, the finality is given in the act itself which refers to excluding aliens from the country and does not apply to the present case. It is evident that the finality of the department's findings on appeal is intended only to save delay and enables the immigration

authorities to determine the status of an alien before he is permitted to enter the country and acquire a domicile here.

Counsel for appellant have quoted the following from Section 25 of Act approved February 20, 1907, Ch. 1134, 34 Stat., 907.

> "That in every case where an alien is *excluded* from admission into the United States under any law or treaty now existing or hereafter made, the *decision of the appropriate immigration officers*, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Commerce and Labor."

And it has been attempted to bring this case under this section and the portion thereof above quoted. A further excerpt from the section will no doubt decide any possible question as to what class of cases are applicable thereunder.

> "Sec. 25. That such boards of special inquiry shall be appointed by the Commissioner of Immigration at the various ports of arrival as may be necessary for the *prompt determination* of all classes of immigrants *detained at such ports under* the provisions of law. Each board shall consist of three members, * * *.
>
> "Such board shall have authority to determine whether an alien who *has been duly held* shall be allowed *to land* or be deported * * * but either the alien or any dissenting member of the said board may appeal, * * * to the Secretary of Commerce and Labor * * *."

The section admits of but one construction. It applies as stated therein, to cases wherein is involved

> *"the prompt determination of all cases of immigrants detained at such ports;"*

to those cases wherein is involved the right of an alien *"who has been duly held to land,"* and to cases where the alien is excluded from admission. Obviously it can not be made applicable to the present case. Lewis was not duly

held, he was allowed to land and therefore, does not stand in the same class as the alien who is stopped at our border.

Here is a provision to save the delays incident to proceedings in court in dealing with aliens of the excluded classes who are "duly held" or are detained when seeking admission into the country. The several cases cited by counsel for appellant come squarely within such classes.

The District Attorney cites the case of *Taylor vs. United States*, 152 Federal 1 (C. C. A., 2nd). This case was reversed by the Supreme Court, 207 U. S., 120, and in commenting on the omission of the word "immigrant" the court said:

> "We see no reason to suppose that the omission meant to do more than to avoid the suggestion that no one was within the Act who did not come here with the intent to remain."

There appears to be no question that the courts have the same jurisdiction and authority to review and to determine the legal questions involved here as in any other cases passed upon by an administrative branch of the government.

Ex Parte Milligan, 4 Wall., 2.

> "The fact that the court can inquire by habeas corpus whether a person is within a class amenable to a particular jurisdiction has frequently been the subject of review by the courts, and would seem to be no longer open to controversy."

See also 207 U. S., 100.

Ex Parte Watchorn, C. C. 160 Federal, 1014.

This case is again applicable to the case before the court in this, that if it could possibly be maintained that Lewis was found guilty of or admitted the commission of a felony or of a crime involving moral turpitude in that he was fined $10.00 by a New York Police Judge 3 years after

his entry into the United States in 1904, but prior to his crossing the river from Windsor into the United States in 1910, it must be admitted that such offense was committed after he left Russia, the country to which he has been ordered deported.

As to the finality of the decision of an executive official on the application and interpretation of a statute the court said:

> "* * * Nor can such finality of executive decision have sanction under our system of government * * * we believe the ultimate decision of the fundamental questions above stated must remain with the courts."

Counsel for appellant have defined moral turpitude and have submitted authorities on what constitutes a felony or other crime or misdemeanor involving moral turpitude. We fail to see that on the record the question has any bearing on this case.

It was held *Ex Parte Saraceno*, 182 Federal, 955, that Saraceno who, prior to his entry to the United States had twice been arrested, being convicted on the second occasion of carrying a concealed weapon, that this was not an offense involving moral turpitude. And in *United States vs. Sibray*, 178 Federal, 152. The fact that the alien admitted that prior to his immigration he had committed a single act of adultery in the country from which he immigrated was not sufficient to support a warrant of deportation on the ground that he was an alien who committed or had committed a felony or other crime or misdemeanor involving moral turpitude.

The accusation that he is a person likely to become a public charge has no better foundation. The warrant was based upon his entry at Detroit from Windsor, Canada, November 17, 1910, at which time as the learned District Judge has said (Record, 16):

> "He was able bodied, industrious and self-supporting and nobody has suggested the contrary."

We have not been able to find in the Reported Cases after diligent search any instance where it has been held that an alien whose record shows not a single arrest before coming to this country, can be excluded or deported on the surmise that he may become a public charge as a result of arrest and imprisonment, and as Judge Denison has also said (R., 16) the proposition advanced by the department that he was likely to be arrested and convicted for bringing a woman into the country contrary to law and so become a public charge is collateral to the importing charge and must stand or fall with it.

Counsel for appellant cite the case, *Williams, Immigration Commissioner vs. United States, ex rel., Bougadis*, 186 Fed., 478 (C. C. A., 2).

Bougadis, it is said, gained admission to the country by falsely representing himself to be a citizen. He was discharged on habeas corpus proceedings on an order from the Circuit Court for the Southern District of New York on the sole ground that a verdict of acquittal had been directed by the Circuit Court for the Eastern District of New York, after trial upon an indictment charging that he had obtained admission to the United States by falsely representing himself to be an American citizen.

It will be noted that the court in this case recognized its jurisdiction to review the *whole case* on appeal from the Circuit Court where relator had been discharged in habeas corpus proceedings, otherwise the court would not be in position to say:

> "The department charged with the administration of the law has decided on *ample evidence*, that the appellee was improperly admitted to this country."

It is evident that the Circuit Court of Appeals exercising as it did jurisdiction to review the whole case and from the record to determine that the department had decided

on "ample evidence that appellee had been improperly admitted," to all intents and purposes by this finding reversed the learned Circuit Judge who directed a verdict of acquittal.

The following also is quoted from the opinion:

> "There can be no doubt whatever that the appellee came here under the name of Dimitrios Papos and secured admission as a citizen by falsely representing himself to be Dimitrios Papos, and presenting naturalization papers issued to said Papos."

In other words, Bougadis secured admission to the country by fraud as was also the case of *Looc Shee*, 170 Federal, 566, and this, as we understand it, is the real gist of the case upon which the Circuit Court of Appeals bases its decision. The finding by the Circuit Court of Appeals that there was fraud and that there was ample evidence to warrant the department to hold that the appellee was improperly admitted to the country must have been found in the record of the proceedings before the immigration authorities, as filed in the case on appeal to the Circuit Court of Appeals.

The case stands in a similar class to those where the authorities may exclude the alien at the border. It being true that appellee gained admission to the country fraudulently it can not be said that he ever actually gained admission at all, and therefore not being in position to profit by his own fraud, could acquire no rights which the government was bound to respect by reason of having a domicile in the country. He falsely represented himself to be a citizen; had his representation been true, he would not have been subject to exclusion or deportation for any cause whatever. Fraudulent representations as to citizenship and the presenting of naturalization papers made it possible for the alien to gain admission without the inspection contemplated by law and such admission being thus gained by fraud could confer no rights upon him.

A review of the record filed by the District Attorney in the present case in which record is found the evidence on which Lewis was ordered deported by the department discloses that unlike Bougadis, Lewis did not gain admission to the country by fraud either at the time of his actual entry in 1904 or when he crossed the river November 17, 1910. No evidence was taken November 17, 1910, as to his fitness, or as to misrepresentations as to himself, whereby he gained admission in 1904. Any possible misstatement on November 17, 1910, as to his wife, could not effect his own right to return to his domicile. It is conceded that he was admitted on the last occasion by the authorities because of his showing of having passed inspection and been lawfully admitted in 1904. It is not questioned that the statements made with reference to himself were true, as appears in the record. Obviously it can not be maintained that Lewis gained admission by any fraud or artifice, and certain it is that it cannot effect his right to return to his domicile here that any other party may, or may not, have attempted to gain admission by misstatements, it matters not by whom such misstatements were made. The department must have exercised its imagination incredibly to arrive at the conclusion that an alien gains admission to the country fraudulently, who (on returning to the country after less than an hour's absence therefrom, having resided peaceably five years prior thereto, and having gained admission in the first instance regularly and lawfully) makes possible misstatements as to another party who is seeking admission.

No statute has yet been passed making ordinary prevaricators subject to exclusion or deportation.

WARRANT VOID.

U. S. Ex Rel Huber vs. Sibray, 178 Fed., 144.

The warrant of arrest in this case recited that Hans Huber, alien.

"who landed at the port of New York, per S. S. Pretoria, on the 4th day of October, 1907, has been found in the United States in violation of the act approved by Congress February 20, 1907, to-wit, that the said alien is a member of the excluded classes, in that he imported a woman for an immoral purpose, and that he has been convicted of or admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States."

Of the warrant, Orr, District Judge, said:

"I am constrained to hold that the charge is not sufficiently specific. It is not required that the warrant of arrest should have the formality and particularity of an indictment but it should give to the alien such information of the specific act or acts which bring him within the excluded classes, so that he can offer testimony in refutation of the charge at the hearing directed to be had by the warrant of arrest in pursuance of the Act of Congress and the rule of the department. What woman is he charged with importing and for what immoral purpose? Was he convicted of or did he admit commission of a crime? Was it a felony or other crime or misdemeanor involving moral turpitude? If either which was it? By paragraph B, Rule 35, as has been seen, a full statement of the facts must be the basis of the warrant. It is contemplated, therefore, that facts, and not conclusions, must be set forth in the warrant."

The department have arrested Lewis on a warrant in which it has been attempted to bring him within the class of excluded aliens as set forth in Section 2 of the Immigration Act approved February 20, 1907, as amended March 26, 1910. It will be observed, however, that the warrant under which he was arrested is open to the same criticism complained of by the learned District Judge in the case above quoted. Lewis is charged with having been convicted of and admitted having committed a felony or

other crime or misdemeanor involving moral turpitude prior to his entry into the United States. That he is a person likely to become a public charge; that he secured admission into the United States by false and misleading statements thereby entering without the inspection contemplated by law and that he procured, imported and brought into the United States a woman for immoral purposes. With the exception as to the charge with reference to the woman the record does not show to what, any of the other accusations are intended to refer.

Appellant's counsel have commented on the proposition that in the Department of Commerce and Labor is vested the power to expel aliens who, having entered the country, are found to be here unlawfully.

The real ground on which appellee was held to be unlawfully within the country, was that he is an alien, who had imported a woman into the country for an immoral purpose, any other accusation entitled to consideration being collateral thereto. This Count having failed, he was not in the country unlawfully and could not be deported, not having been convicted, as provided in Section 3, which is an element necessary to support the deportation warrant.

Finally it should be noted that appellee in this case is ordered deported to Russia. The entire case is based on the occurrence of November 17, 1910. His entry from Russia was in 1904. In a similar case *United States, ex rel., Ruiz vs. Redfern*, 186 Fed., 603, Foster, District Judge, said:

> "The Immigration Laws clearly contemplate the deportation of aliens to the country whence they came when they illegally entered the United States, regardless of their nativity. The only exception is when an alien intending to enter the United States for the convenience of his voyage lands first in foreign territory contiguous to the United States. I do not find that the Secretary of Commerce and Labor has any

discretion whatever in the matter, and any warrant that attempts to exercise such discretion is necessarily illegal and void."

The decision of the learned District Judge should be sustained.

Respectfully submitted,

Philip T. Van Zile
Counsel

FREDERIC S. FLORIAN,
GUY W. MOORE,
H. P. WILSON,
Attorneys for Appellee.

DATED DETROIT, MICHIGAN, ~~OCT. 30TH, 1911~~.

Mar 11-1912